U.S. Department of Labor

Office of Administrative Law Judges
John W. McCormack Post Office and Courthouse
Room 505
Boston, MA 02109

(617) 223-9355
(617) 223-4254 (FAX)

Issue Date: 18 August 2003

CASE NO.: 2001-LHC-00340

OWCP NO.: 01-120657

In the Matter of

CLARENCE SMITH
Claimant

v.

ELECTRIC BOAT CORPORATION
Employer/Self-Insurer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS[1]
Party-in-Interest

Appearances:

Carolyn P. Kelly, Esquire (O'Brien, Shafner, Stuart, Kelly & Morris),
Groton, Connecticut, for the Claimant

Peter A. Clarkin, Esquire (McKenney, Jeffrey & Quigley),
Providence, Rhode Island, for the Employer/Self-Insurer

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

[1] The Director was designated as an interested party because the Employer had requested liability relief from the Special Fund pursuant to 33 U.S.C. § 908(f). However, the Employer withdrew its request for Special Fund relief at the hearing, and the Director has not participated in this proceeding.

I. Statement of the Case

This matter arises from a claim for workers' compensation benefits filed by Clarence Smith (the "Claimant"), a former shipyard worker, against the Electric Boat Corporation (the "Employer") under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq.* (the "Act"). A hearing was conducted before me in New London, Connecticut on May 29, 2001, at which time all parties were given the opportunity to present evidence and oral argument. The Claimant appeared at the hearing represented by counsel, and an appearance was made by counsel on behalf of the Employer.

The Claimant testified at the hearing, and documentary evidence was admitted as Administrative Law Judge Exhibits ("ALJX")1-8, Claimant's Exhibits ("CX")1-24, and Employer's Exhibits ("EX")1-4, 9. Hearing Transcript ("TR") 7-15. The Claimant objected to labor market survey evidence (EX 5 and EX 6) and surveillance evidence (EX 7 and EX 8) offered by the Employer on the ground that he was not given an opportunity to cross-examine the authors of these exhibits. In addition, the Claimant contended that the labor market surveys were conducted in 2000 and are irrelevant, particularly without testimony to explain their relevance. TR 12-14. I took the Claimant's objections under advisement and, after hearing the Claimant's testimony, I granted the parties' request to continue the hearing to the week of August 15, 2001 in order to permit the parties an opportunity to resolve the Claimant's evidentiary objections through post-hearing depositions and to offer additional vocational evidence. TR 15, 60. At a case conference on August 15, 2001, the parties advised that a reconvened hearing was unnecessary at that time and that they anticipated resting after the submission of post-hearing depositions. Pursuant to a status order issued on January 29, 2002, the Claimant's counsel advised by letter dated February 7, 2002 that a reconvened hearing was unnecessary and requested until March 8, 2002 to submit closing briefs. Within the time allowed, the following evidence had been offered:

Deposition of Clarence Smith (December 14, 2001)	CX 25;
Deposition of David B. Robson, M.D. (December 13, 2001)	EX 10;
Deposition of Sherwyn J. Wayne, M.D. (December 14, 2001)	EX 11; and
Deposition of Steven Fox (December 14, 2001) including Exhibit 4 to the deposition, videotapes dated November 18, 1999, February 8, 2000 and February 9, 2000	EX 12.

No objection was raised to any of these post-hearing exhibits, and they have been admitted to the record. After submission of this evidence, the parties filed briefs in March 2002 and the record was closed. However, upon review of the closed record and the parties' briefs, it was unclear whether the status of Claimant's objections to the Employer's labor market evidence was unclear since no post-hearing deposition testimony from the Employer's vocational experts had been

offered.[2] In an effort to clarify this matter, an order issued on October 3, 2002, directing the Claimant's attorney to advise whether the Claimant maintained his objection to the labor market evidence. The Claimant's attorney responded that the objection remained, and it was agreed by counsel during a telephone case conference on October 28, 2002 that the record would be reopened for a period of 30 days for the Employer to schedule and offer the deposition testimony of the vocational expert witnesses who prepared the labor market surveys in question. The record was reopened by order issued on October 28, 2002, and the Employer's unopposed request for an additional 60 days was allowed. When the extended time frame expired without any offer of evidence or request for additional time, another status order issued on March 21, 2003. The Claimant responded that the depositions had not been scheduled by the Employer and that the objection remained as to the labor market evidence. The Employer responded that it had encountered significant difficulty in scheduling the depositions of the two vocational experts who reside in Missouri, and it requested additional leave to May 15, 2003 to schedule and take the depositions.[3] The Employer further responded that it would withdraw the labor market evidence if the depositions were not completed by May 15, 2003. By order issued on April 10, 2003, I granted the Employer's request as reasonable in light of the agreement to withdraw the disputed evidence if the depositions were not completed by May 15, 2003, and I allowed the Employer until May 31, 2003 to offer the transcripts of the depositions. With the Claimant's assent, the depositions were ultimately rescheduled and taken on May 30, 2003 due to one deponent's absence from the country, and by letter dated August 4, 2003, the Employer offered the following additional exhibits:

Deposition of Brenda Young (May 30, 2003) EX 13; and

Deposition of Fran Whipps Zedalis (May 30, 2003) EX 14.

The Claimant has not objected to the introduction of this testimony which has been admitted to the record. Both parties were allowed an opportunity to file supplemental briefs addressing the new evidence. The Claimant did submit a supplemental brief within the time allowed, and the Employer waived submission of any further closing argument, maintaining in a letter dated August 4, 2003 that the deposition transcripts, particularly that of Ms. Young, speak for themselves. Finally, the record is now closed.

After careful analysis of the evidence contained in the record and the parties' arguments, I conclude that the Claimant is entitled to an award of permanent partial disability benefits and attorney's fees. My findings of fact and conclusions of law are set forth below.

II. Stipulations and Issues Presented

---

[2] The Claimant's objection to the surveillance evidence was resolved through the post-hearing deposition of the Employer's investigator.

[3] As discussed below, the Claimant relocated to Missouri after leaving the Employer's Connecticut shipyard. Since he had also pursued and obtained employment in Missouri, the Employer developed labor market evidence for that geographic area.

The parties offered the following stipulations which I now adopt as my findings:

(1) the parties are subject to the Act;

(2) the Claimant sustained a back injury in Groton, Connecticut on July 23, 1991;

(3) an employer-employee relationship existed at the time of the injury;

(4) the injury arose in the course and within the scope of employment;

(5) the notices and claims were timely filed;

(6) an informal conference was held on May 10, 2000;

(7) medical benefits have been paid to various providers throughout the period since the date of the injury;

(8) the Claimant has been paid both temporary total and temporary partial disability benefits;

(9) the Claimant was at the time of the hearing receiving temporary partial benefits in the amount of $366.67 based on an earning capacity of $200.00 a week which had been computed as of the date of injury;

(10) the average weekly wage is $750.00 per week;

(11) the Claimant has not returned to his regular employment.

TR 7-8. The parties further agreed that the only unresolved issue is the nature and extent of the Claimant's disability. TR 8; Employer's Trial Memorandum at 4-5.

III. Summary of the Evidence

A. The Claimant's Testimony

At the hearing, the Claimant testified that he was born on April 8, 1937 and was then 64 years old. TR 18. He stated that he graduated high school in Canton, Mississippi in 1956 and then worked as a psychiatric aide for the State of New York Department of Mental Health from 1956 to 1962 in Wingdale, New York where his duties included working with mental patients in occupational therapy, taking them to lunch, and ensuring they went to bed at the proper time. TR 18-19. He then went to work for the Employer in Groton, Connecticut as a boilermaker, doing welding and steel fabrication in the shipbuilding process. TR 19-20. He testified that he remained in that position for about two years, until he was laid off and transferred to ship testing where he worked for another year and one half, conducting hydrostatic tests on various ship parts and components, such as pipes and valves, to ensure their integrity. TR 20.

The Claimant next went to work for the Thames Valley Council for Community Action ("TVCC") for about six years as a field supervisor, helping young people, aged 14 to 21, secure jobs and training. TR 21-22. This job was different from the work he performed for the Employer, and he received on-the-job training. TR 21. He then went to work as an engineer's aide for United Nuclear for about three years, testing various mock-up work and production parameters for the nuclear power industry business. TR 22.

After leaving United Nuclear, the Claimant returned to work for the Employer in 1975 as an educational service representative, setting up training programs for entry-level employees in the skilled trades. TR 23-24. He testified that this job involved certifying new employees through course work to a certain standard in order to let them perform production work. TR 24. He remained in this position for two years and was then promoted to the position of training supervisor, where he was responsible for running the stock yard and welding school and for managing a staff of eight people, as well as providing hands-on training. TR 24-25. He testified that he worked as the training supervisor for about ten years until the Employer "downsized" the department, cut the supervisory position and transferred him to an instructor position, where he stayed for about one year until he was injured. TR 25-26.

The Claimant testified that prior to the incident that caused the injury, he had carried a 110 to 120-pound steel plate up a flight of stairs, placed it on the ground to open a door, and relifted it. TR 26. He later felt "some sting" in his legs, but it did not cause him to see a doctor and eventually went away. TR 26. He further testified that the lower back injury occurred when he was cutting and lifting steel while in the process of fabricating test plates to qualify welders. TR 25-26. He did not know how many plates he lifted. TR 27. He stated that the next morning, he "could not move . . . [t]he lower part of my back felt like a toothache . . . it was burning so bad and feeling so horrible that I could not get out of bed." TR 26-27. He went to the Pequot Medical Center for an examination and x-rays, and was diagnosed with a severe back strain and referred to Dr. Sprafke. TR 27. He testified that he was seen by Dr. Sprafke, who prescribed medication and physical therapy, which provided some relief, but his condition never improved to a point where he felt comfortable returning to his job at the Employer. TR 27-29. He said that Dr. Sprafke had told him to list his work capabilities as "light duty" on job applications, including applications that he filed with Benny's and Sears, but he was unable to find any work for a year. TR 29-30.

The Claimant testified that following his injury at the Employer, he moved permanently to St. Louis in 1992 because that area presumably offered better job opportunities, and he obtained employment as a program coordinator for Webster University. TR 29-30. He explained that this job was federally funded and involved working with elementary and high schools to set up programs designed to improve inner-city youths' SAT scores and computer skills. TR 30-31. He stated that he remained in this job for about three and a half years until September 1995 when the funding was not renewed. TR 31. He then went to work for Continco as a machine operator fabricating plastic components but was unable to keep this job because it required handling components every three minutes, which was too difficult due to hand problems. TR 31-32. He also stated that his back caused him problems on this job because it involved twisting, bending, and other movements. TR 32-33. Regarding his hands, the Claimant testified that he had been

diagnosed with carpal tunnel syndrome which is related to his previous work with the Employer. TR 33. He also said that he also experienced pain going down his leg, but did not know if it originated in his back. TR 33-34.

In St. Louis, the Claimant initially treated with a Dr. Banton for his back and later with Dr. Taylor. TR 34. He stated that he continues to have problems with back pain even though he has always been active and learned to deal with pain as a football and basketball player. TR 34-35. He testified that he currently is treated by Dr. Ibrahym, an orthopedist who took over Dr. Banton's practice upon retirement. TR 40-41. He stated that he does not see Dr. Ibrahym on a regular basis, but as needed to change medications, or if the pain becomes severe. TR 41. He described his current back condition as consistent pain that he can ignore until aggravated by picking up something heavy or performing similar activities. TR 41. Regarding his limitations, he stated,

> It's hard for me to sit down for long periods of time. I feel more comfortable standing. And at one point I slept on a board under my mattress and that seemed to help take some of the pressure away or whatever. And like right now, I'm feeling okay, you know, but there are times like when the weather changes, if it's wet or damp or cold, I have difficulty with both my back and my hands . . . [m]y back seems to act up more when the weather is damp and cold than it does in the heat.

TR 42-43. He stated that he takes 750 mg of Relafen twice a day for pain and inflammation. TR 42. He added that he wears a back brace under his clothing and another heavy brace around his waist when he needs to perform certain activities, like mowing the lawn. TR 42.

The Claimant testified that he would not be able to return to his former position as an instructor with the Employer where he had to lift heavy steel plates because of the difficulty with his back and hands. TR 43. He said that he is aware of some jobs which use a machine to perform welding where no lifting was required, which he could perform. TR 43. He testified that he would attempt any kind of activity prior to the 1991 injury, that he had a strong work ethic, but now limits his activities. TR 43-44. He further testified that he was an "avid golfer" before the injury and had won tournaments, including two tournaments sponsored by a subsidiary of the Employer, he currently plays only on a limited basis on par three courses. TR 44. He stated that his back basically feels the same after he plays golf, similar to when he mows the lawn. TR 44-45. He described himself as an athlete and testified that he would still be competing in golf tournaments, if not for his back injury. TR 45.

The Claimant testified that he also has been diagnosed with borderline diabetes, which he treats with diet and physical exercise, but he does not take any medication. TR 45. He explained that the back injury is the only thing that has held him back in his life, that he has always been a healthy, active person and that he only missed six hours of work in two and a half years working for the Employer. TR 45-46.

The Claimant testified that while working for Webster University, he received his bachelor of science degree in media communication. TR 35. He explained that media communication involved news gathering, reporting, photography and videography, but he has been unable to obtain employment in this field. TR 35. However, he stated that he has looked for work since leaving Continco at General Motors in a parts department, a temporary agency where he was told that he was overqualified for a supervisory position, Ford, Chrysler and Anheuser Busch. TR 36. He said that his described his job search activities have consisted of looking for employers through Standard & Poors and by reading newspapers. TR 36. He testified that he has also applied for part-time positions in sales for a shoe company, a boot company and two chemical companies and for a buyers' liaison position with a real estate developer. TR 37-38. He testified that this latter job opportunity with the real estate developer might materialize within a few months after the hearing, and he stated that he also had a pending application for a federally-funded position as a grant writer or liaison with the community service subsidiary of a church in St. Louis. TR 37, 39-40. He further testified that he had attended three grant writing seminars in anticipation of obtaining this job. TR 40-41.

Regarding the positions identified in the Employer's labor market survey, the Claimant testified that he has worked in the human resources field, but not as a manager, and he would not be qualified for a human resources manager position without training. TR 46. He stated that he could do spot welding, which involved operating a machine that performs the welding, and he stated that he applied for a spot welding job at Chrysler Corporation but was not hired. TR 46. He further stated that he could not perform grinding, milling or boring work because of his hand injury and a restriction against using vibrating tools imposed by one of his doctors, probably Dr. Taylor. TR 47. He added that he also treated with Dr. Browning in Norwich for his hand injury, received a rating in a report dated 1998 and does return periodically to see Dr. Browning, as well as another doctor in St. Louis to whom he was referred by the Employer. TR 47-48. He testified that he would not be able to perform MIG welding, which he described as a semi-mechanized process that requires hand manipulation for an entire day. TR 48. He testified that his only sales experience dates to when he was 15 or 16 years old, but he would be open to a sales job. TR 49. He said that he used a computer at Webster University and that he could use a computer on a limited basis now, but not for eight hours a day. TR 49. He testified that he could stand still for a couple of hours and then would feel fatigued and shaky. TR 50. He stated that he can walk on a straight path without any problem, but has to be careful stepping onto a curb so that he does not lose his balance. TR 50-51. He further stated that sitting is worse than standing because his back and lower extremities sting after an hour or an hour and a half, forcing him to stand or walk around. TR 51.

On cross-examination, the Claimant testified that he worked full-time for Webster University where he had an office in two schools and the university. TR 52. He stated that he worked an hour per day at each school with about 30 youths training them on computers. TR 52-53. He further stated that he obtained his B.S. degree at night while he was working full-time at Webster University. TR 53. He testified that he would try any job that did not require lifting steel plates or other heavy objects because he believed that he could accomplish any job by both standing and sitting, except for driving a bus or van. TR 53-54. He expressed an interest in a job

recruiting students for a technical school and said that he enjoyed working one-on-one with people, which would be similar to his previous training work with the Employer. TR 54.

The Claimant described his back pain as constant with worsening pain in cold or damp weather or when he engages in certain activities, like opening a kitchen window behind the sink. TR 55. He agreed that his general condition was a "dull ache," which was how it felt when he worked for Webster University. TR 55-56. Regarding the golf activity, he testified that he prefers to ride a cart, but the par three courses do not always allow carts. TR 57. He testified that he would prefer a full-time job with benefits. TR 57. He stated that he can drive and that he drove out to Connecticut from St. Louis with a friend. TR 58. On redirect examination, the Claimant testified that he did not believe that he could lift under 50 pounds on a regular basis, but that he could on occasion. TR 59.

Seven months after the hearing, the parties took the Claimant's deposition on December 14, 2001. CX 25. He testified that he continued to look for work after the hearing in May 2001. *Id.* at 6. He stated that he was given labor market surveys (EX 5 and EX 6) and recalled filing applications at Vatterott College and a technical college for a recruiter position but was not hired. *Id.* at 6-7. He said that he looked at all of the jobs in the labor market surveys and applied for those positions which he felt he could do based on his education, skills and physical restrictions, but none of his applications produce an offer of employment. *Id.* He stated that he also looked in newspapers for job openings and applied for clerks positions in several retail stores, but he was not hired. *Id.* at 7-8.

The Claimant testified that he was eventually hired by Colquitt Unlimited, a construction company, as a floor manager and trainer, setting up work schedules and ensuring the availability of the proper tools. *Id.* at 8-9. He stated that the project he is working on involves converting a former department store into a church. *Id.* at 9. He started this job around September 1, 2001 and is paid $8.50 an hour, working 15-20 hours per week depending on the needs of the job. *Id.* at 9-10. He testified that his hours may increase as the project develops. *Id.* at 10. He stated that he probably worked less than 20 hours the previous week and has worked about 15.5 hours the current week, but could have worked more hours if not for the deposition. *Id.* at 10-11. He further stated that the project is scheduled to last two and a half years and that Colquitt has other projects going on at the present time. *Id.* at 13.

The Claimant further testified that he continues to look for other work and has an interview for a part-time, and possibly full-time, clerk position in the meat department at Dierberg's, a large supermarket chain, ranging $7.00 to $9.00 per hour, with possible benefits. *Id.* at 11-12. He stated that he did not have benefits with Colquitt. *Id.* at 12. He applied at another store, Schnuck's, which may also offer fringe benefits. *Id.* He believes that he can work in a meat department, with a freezer-type area, even with his physical restrictions because he would be mostly wrapping meat and affixing labels. *Id.* at 12-13. Regarding any recent exacerbations of his back condition, the Claimant testified that he continues to take Relafen and visited Dr. Ibrahym recently to discuss a new procedure, but that Dr. Ibrahym would not recommend it for his condition. *Id.* at 13-14.

On cross-examination, the Claimant was questioned about the two job possibilities that he mentioned at the hearing. He stated that the liaison job with the real estate developer is on hold because the property under acquisition is involved in litigation and that the position with the church is not going to be available. *Id.* at 15-16. He stated that about 25 percent of the jobs in the labor market surveys would be appropriate for him given his experience and travel concerns. *Id.* at 16-17. He continued that while he did not have a lot of sales experience, he believed that he could perform a sales job. *Id.* He stated that his physical condition is about the same as it was in May in that he can have exacerbations. *Id.* at 17. He added that he does not wear a back brace daily, but only for flare ups, and does takes medication daily. *Id.* at 17-18. He continues to treat with Dr. Ibrahym on an as needed basis. *Id.* at 18.

He testified that he continues to look for full-time work and believes he can physically work full-time so long as it does not involve heavy physical labor, such as lifting over 50 pounds. *Id.* at 18-19. He described his hand limitation as numbness in the tips of each finger, which can sometimes radiate to his elbow and worsen in damp, wet or cold conditions. *Id.* at 20-21. He stated that he experienced hand problems when he was hanging his Christmas tree lights and would not be able to work with vibrating tools. *Id.* at 21-22. On redirect examination, the Claimant testified that he did not talk with Dr. Ibrahym about work restrictions, but had talked to his previous doctor, Dr. Banton, and those restrictions were similar to those listed by his other doctors. *Id.* at 24-25.

B. Medical Evidence

The Claimant offered disability slips from Donald F. Sprafke, M.D., showing that he was disabled from working on five occasions in August - November 1991 due to a lumbar sprain. CX 2; CX 4. Dr. Sprafke also signed slips returning the Claimant to light duty work in November 1991, December 1991 and March 1992. CX 7. He was treated with physical therapy in September 1991. CX 3. On September 27, 1991, Eric N. Thompson, M.D., examined the Claimant and observed him "standing with a significant forward stoop and list to the right. . . . and some spasm of the right side paralumbar muscles." *Id.* Dr. Thompson opined that the Claimant was disabled from his usual work and that the prognosis for a complete recovery was guarded because of severe symptoms two months after his injury. CX 5. Dr. Thompson wrote that the Claimant had reported a grating sensation on the right side of the low back with forward bending and raising his right leg, radiating pain to the lower extremities, and difficulty standing straight and sitting for more than 20 minutes. *Id.* He also stated that the film review showed no evidence of disc disease, but did reveal an abnormality, a possible spondylolysis, of L5. *Id.*

Philo F. Willetts, Jr., M.D., evaluated the Claimant and provided a medical opinion dated October 15, 1991 that the Claimant had low back and bilateral lower extremity pain with no objective sign of neurological deficit or herniated disc. CX 6. He observed a transitional S1 (or L5) vertebra on the x-rays of the lumbar spine and provided work restrictions of no repetitive bending, lifting over 15 pounds, sitting more than 45 minutes, and standing more than 2 hours. *Id.* He opined that the Claimant had not reached maximum medical improvement, but would do so in approximately three months. *Id.*

In letters dated March 30, 1992 and April 3, 1993, Dr. Sprafke reported that he treated the Claimant on several occasions, the last being July 29, 1992, and that the Claimant has a 20% permanent partial impairment secondary to chronic lumbar strain that has not responded to normal treatment. CX 9; CX 10.

Hospital records show that the Claimant sought treatment for recurrence of lower back sprain on November 10, 1992 after he being chased down a hill by a dog the previous month, and films taken about that time showed possible spondylolysis at L5-S1. CX 11; CX 12. The Claimant sought periodic treatment at Olive Family Medical Center from 1994 through 2000. CX 13. By letter dated September 1, 1995, Peggy Boyd Taylor, D.O., reported that she examined the Claimant on three occasions, ordered an electromyogram, and provided physical work restrictions of no more than 2 hours of continuous sitting or standing, no more than one-quarter mile of walking, no lifting over 20 pounds or pushing/pulling over 25 pounds, and no bending, squatting/stooping, crawling, climbing, kneeling, twisting, reaching above shoulder, operating motor vehicle/crane/forklift, working in tight/confined machinery, or physical activity stress. CX 18; CX 19. An electromyogram nerve conduction study conducted by Glenn M. Sherrod, D.O., at the request of Dr. Taylor, on or about August 21, 1995, showed mild polyneuropathy of the lower extremities, in addition to probable mild bilateral carpal tunnel syndrome. CX 17; CX 18.

Records from Zaki G. Ibrahym, M.D., show that he treated the Claimant at the request of Dr. Banton, from April through December 2000 for chronic back pain and ordered an MRI. CX 20; CX 21; CX 22. X-rays taken by Dr. Ibrahym show degenerative changes throughout the lumbar spine, particularly prominent at L5-S1 and a possible L5 pars defect; and the MRI study was essentially normal. CX 20. Dr. Ibrahym reported that the Claimant's symptoms may be "secondary to neurogetic claudication or radiculopathy coming from his lumbar spine" despite the normal MRI, and he prescribed Relafen and physical therapy. *Id.* On October 15, 1998, S.P. Browning, III, M.D. opined that the Claimant had a 35% bilateral hand impairment. CX 23.

The Employer offered two reports from David B. Robson, M.D., dated March 30, 1995 and November 18, 1999 and a deposition taken on December 13, 2001 with attached exhibits. EX 3, 4, 10. At the deposition, Dr. Robson testified that he is an orthopedic surgeon who did fellowship training in spine surgery and that he limits his practice to the treatment of the lumbar spine, focusing on patients as opposed to academic pursuits. EX 10 at 6. He stated that he graduated St. Louis University Medical School, completed a five-year orthopedic surgery residency at St. Louis University, was a spine surgical fellow in Cleveland and St. Louis University, and has been in practice in St. Louis since he completed his residency in 1989. *Id.* at 6-7. He further stated that he is board-certified in orthopedic surgery, that he is on the staff at St. Joseph's Hospital in St. Charles, St. Mary's Hospital in Clayton, St. Joseph's Hospital in Kirkwood, and the Missouri Baptist Medical Center where he is chairman of the Department of Orthopedic Surgery, and that he is a clinical instructor at St. Louis University. *Id.* at 7.

Dr. Robson testified that he examined the Claimant on two occasions -- March 30, 1995 and November 18, 1999. *Id.* at 8. He previously testified at a deposition testimony after the March 30, 1995 examination, and the transcript of his earlier testimony is included in the deposition transcript as Deposition Exhibit 3. *Id.* Regarding the November 18, 1999

examination, he testified that the Claimant provided a history that he injured his lower back and neck lifting a plate when he was welding on July 3, 1991 and that he had been working on and off since 1991, but could not tolerate returning to his previous work in a shipyard. *Id.* at 8-9. He stated that the Claimant recited his multiple attempts to rehabilitate his back through physical therapy and anti-inflammatories, which had relieved his problem to some extent. *Id.* at 9. Regarding any active treatment, Dr. Robson added that the Claimant reported some recent testing, but no medical records were available or provided to confirm the testing or any other treatment between the 1995 and 1999 exams. *Id.* at 9-10. He also stated that the Claimant reported that nothing out of the ordinary or of significance had occurred since the 1995 exam. *Id.* at 10. He stated that the Claimant described his physical complaints as "low-back pain and intermittent bilateral leg radiating pain, as well as neck pain," which had remained the same since the 1995 exam. *Id.* at 10-11. Dr. Robson stated that he had no conversations with the Claimant about activities he was capable of performing. *Id.* at 11.

Dr. Robson testified that the Claimant successfully completed a physical examination, which consisted of moving about the exam room and standing on his toes and heels to test indirectly the motor and neurologic function of the lower extremities. *Id.* at 11-12. He further testified that he observed the Claimant bend over and touch his toes, but that he could only bend over 60 degrees because he was too sore. *Id.* at 12. He continued that the Claimant could raise his legs to 90 degrees in a seated position, which would be consistent with bending to 90 degrees; however, the Claimant only bent to 60 degrees. *Id.* at 12. Dr. Robson indicated that this would be some evidence of the Claimant's interest in showing a limitation that does not exist, where neurologic examination, including motor function, was normal. *Id.* at 12-13. He also explained,

> In a seated position I would ask the patient to point his ankles and toes toward the ceiling, which is dorsiflexing. That would test the L5 nerve root and part of the L4 nerve roots of the lower extremities. And then I would like to test the strength of that to grade the muscle strength, and so I would resist their dorsiflexion. And if a person had a true weakness, the foot would just simply fall in a real smooth fashion when I just touched it lightly, and a person who would be trying to demonstrate weakness couldn't do that voluntarily; they would have a herky-jerky type resistance.

Id. at 13. He described the neurologic testing as "test[ing] the reflexes of the knees and ankles, the sensation to both lower extremities, the motor function of the hips, quadriceps, hamstrings, ankle and toes." *Id.* at 14.

Dr. Robson testified that he reviewed an MRI from Christian Hospital Northeast, dated December 21, 1992 and May 23, 1995, an MRI of the cervical spine, dated August 19, 1994, and plain lumbar spine x-rays, dated October 19, 1993. *Id.* at 10. He stated that these films, more specifically the 1993 x-rays, showed only a bilateral pars interarticularis defect at L5, or spondylolisthesis, but the Claimant did not actually have slippage of his spine. *Id.* at 14-16. He further testified that,

> [P]ars interarticularis means the bone between the joints. It's a linkage from one facet joint to the next on each side of the lumbar spine, and it's an avascular small piece of bone that doesn't heal well if it's broken. And they have done extensive studies on when this breakage occurs. The breakage occurs in about 5 percent of the population, so about one out of 20, one out of 25 people have a defect like this. Autopsy studies showed it shows up in the toddler age group like age four to eight years old. Where the fracture occurs, it doesn't heal properly, and if a person is going to develop a slippage, that usually occurs in the teen-age years during the growth spurts.

Id. at 15. He stated that the breakage typically occurs as a child and can be shown indirectly because of the evidence of sclerosis, which shows a longstanding defect. *Id.* at 15-16. He added that the defect is "extremely rare" in adults unless there is a high impact trauma, such as a car accident at 80 miles an hour. *Id.* at 16. He stated that he did not observe the defect on the MRIs which are insensitive to diagnosing pars defects. *Id.* He agreed that there was no definitive way to determine when the Claimant had sustained the defect, only through statistical evidence. *Id.* at 16-17. Dr. Robson acknowledged that it was possible that a person with this pars defect could exhibit the symptoms about which the Claimant complained. *Id.* at 17.

Dr. Robson testified that he gave the Claimant an 8% permanent partial impairment of the whole man in his 1995 report "based on his cervical strain and his lumbar strain superimposed on his previous existent spondylolisthesis," which accounted for both his objective findings and the Claimant's complaints of discomfort *Id.* He stated that this opinion did not change from 1995 to 1999 and that the rating was based on the AMA Guidelines. *Id.* at 18. He testified that, to a reasonable degree of medical certainty, the Claimant strained his neck and low back in 1991, that no future treatment was necessary and that because of his pars defect, it would be difficult for the Claimant to perform heavy labor work, although he could perform medium or less range work, which is defined as 50-pound occasional lifting, 30-pound repetitive lifting, and no repetitive bending, stooping, twisting, or awkward positions. *Id.* at 18-19. He further testified that he advises patients every day about physical restrictions on work activities. *Id.* at 19-20. He added that these restrictions on the Claimant's work activities would also apply to activities outside of the workplace. *Id.* at 20.

On cross-examination, Dr. Robson testified that he generally tells patients with the Claimant's type of injury that if they experience a flare-up, they can treat with over-the-counter anti-inflammatory medication and modification of activity. *Id.* at 20. Regarding observations by two other doctors shortly after the injury that the Claimant listed to the right, Dr. Robson stated that the listing could be indirectly related to the pars defect, but he added that because the pars defect is symmetrical, it should not cause a person to favor one side over another. *Id.* at 21. He opined that perhaps the Claimant experiences occasional muscle spasms, and his listing is more a protective posture to protect against the spasms, rather than one forced by the defect. *Id.* He did not recall reviewing any new films for the 1999 examination. *Id.* He stated that the Claimant did not complain of any acute problem or exacerbation of his condition at either examination. *Id.* at 21-22. Regarding a previous doctor's description of facet joint arthritis and mild sclerosis, Dr. Robson stated that the description could be the same as the pars defect if it were based on the

MRI because an MRI does not show bony detail. However, he said that he would have a problem with this diagnosis if it were based on the x-ray because that would differ from his interpretation. *Id.* at 22-23. He stated that reports of lumbar myospasm could be termed objective findings "to some extent." *Id.* at 23.

The Employer also introduced reports from Sherwyn J. Wayne, M.D. dated September 17, 1993 and May 10, 2001, and a deposition taken on December 14, 2001 with attached exhibits. EX 1, 2, 11. Dr. Wayne testified that he is a Missouri state-licensed, board-certified, orthopedic surgeon, who graduated from the University of Illinois School of Medicine in 1962, interned at St. Francis Hospital in Evanston, Illinois for one year, was in orthopedic residency for five years at St. Louis University, completed a fellowship in reconstructive surgery at the University of Southern California and has been in private practice in orthopedic surgery since September 1967. EX 11 at 6-7. He stated that his practice is primarily treating patients, and he is on the staff at St. Joseph Hospital in Kirkwood, Baptist Hospital in Town & Country, St. Anthony's Hospital in South County, St. Louis University Hospitals and Des Peres Hospital. *Id.* at 6-7.

Dr. Wayne testified that he examined the Claimant on two occasions -- September 17, 1993 and May 10, 2001. *Id.* at 7. He further testified that he approached these examinations no differently than if he were actively treating a patient. *Id.* at 8-9. He stated that, at the 1993 examination, the Claimant reported a low back injury from lifting 115 to 120 pound plates, which resulted in radiating pain in both legs and loss of work for several weeks. *Id.* at 9. He summarized his findings from the 1993 examination as follows:

> It was my conclusion . . . that he presented with chronic lumbar pain; however, there was no objective evidence of significant pathology which would be considered directly attributable to the alleged July 23, 1991 work-related injury. There were no recommendations for additional diagnostic or medical measures and he was considered capable of performing his regular work activities. Finally, it was concluded that he demonstrated no permanent partial disability in regard to the alleged injury.

Id. at 10. Dr. Wayne stated that he obtained an updated history at the 2001 examination, which included the Claimant's work for Webster University, recent treatment with Dr. Ibrahyms, reported lower back pain generally related to activity, no neurologic deficit, and overall good health, other than borderline diabetes. *Id.* at 10-11. He described the medication Relafen as "similar to Ibuprofen." *Id.* at 11. He stated that his physical examination in 2001 revealed no apparent discomfort, normal spine alignment, no midline tenderness, tenderness in the lumbar area excessive in view of minimal pressure, no evidence of muscle spasm, and voluntary lumbar motion 75 percent of normal in all directions. *Id.* at 11-12. He testified that despite the voluntary range of motion at 75 percent, "[a] full range of motion was present in both hips, however, with simultaneous hip and knee flexion he complained of lower back pain, which was a nonorganic response since this maneuver would reduce rather than cause neural impinging pain if present." *Id.* He further stated that the Claimant had a non-physiologic response to light pressure at the ankles and toes, which, if true, would be symptomatic of a person who was wheelchair bound. *Id.* at 13. He summarized that there was no objective evidence of pathology, merely "signs of

symptom embellishment and nonphysiologic responses which were on the basis of something other than pathology." *Id.* at 14.

Dr. Wayne stated that x-rays performed at his office showed only a questionable pars defect with sclerotic margins at L5 on the right, which did not vary with motion. *Id.* at 14. He further stated that a pars defect usually traces to congenital or early development or adolescent changes, which is normally asymptomatic, but can lead to spondylolisthesis, an instability in the spine that can cause discomfort. *Id.* at 15. He acknowledged that spondylolisthesis, in layman's terms, is a slippage of one vertebra on the vertebra below, which would definitely be present on diagnostic films, but did not appear on the Claimant's films. *Id.* at 15-16. He stated that a person may not be aware of a pars defect in a majority of cases. *Id.* He testified that a pars defect can be caused in an adult by a major trauma, such as a fall from a height or a motor vehicle accident, but it is not typically associated with lifting. *Id.* at 16.

Dr. Wayne testified that he also reviewed updated medical records at the 2001 examination,[4] which indicated that Dr. Robson examined the Claimant in 1993 and found no evidence of spondylolisthesis or L5 nerve root radiculopathy and again in 1999 where he reported the Claimant's nonphysiologic response to muscle strength testing. EX 11 at 17. Dr. Wayne summarized his own conclusions as follows:

> [T]he patient presented with chronic lumbar pain syndrome, lacking objective findings on physical examination plus nonphysiologic responses, making it difficult to corroborate those subjective complaints. His x-rays reveal a possible pars defect at L5, but there is no evidence of listhesis. And shortly following his original alleged injury in 1991 he underwent various plain x-rays of the lumbar spine, including a bone scan, none of which revealed a stress fracture in the pars area which would result in a defect.

Id. at 17-18. He opined that to a reasonable degree of medical certainty that "[t]here was no indication that [the Claimant] required medical measures." *Id.* at 18.

Dr. Wayne testified that he has been in practice for 34 years and has advised workers on their ability to return to work. *Id.* at 19. He opined that the Claimant was capable of returning to any work that he was doing previously, and he said that he would not place any work restrictions on the Claimant. *Id.* at 19-20. He testified that there were no changes in his objective findings from the 1993 examination to the 2001 examination. *Id.* at 20. He added that, at the time of the 1993 examination, the Claimant had previously reached maximum medical improvement and that he had not changed at the time of the 2001 examination. *Id.* at 21.

On cross-examination, Dr. Wayne testified that he used the phrase "significant pathology" in his report to mean something that can be objectively proven. *Id.* at 21-22. He further testified that "soft tissue injury" or muscle soreness is a symptom, but without clinical or diagnostic

---

[4] In his 2001 report, Dr. Wayne reports that he conducted "a review of a portion of [the Claimant's] medical records." EX 1.

substantiation, he would not consider it a significant pathology. *Id.* at 22. He continued that, if he had noted muscle spasm in the examination, that would have been an objective finding and would require a search for the underlying pathology. *Id.* at 22. He stated that muscle spasm is typically associated with the acute phase of an injury or disease, and it would be unusual to find chronic muscle spasm. *Id.* at 23.

Dr. Wayne further testified that most of his practice relates to spine and spinal surgery and that he continues to treat patients after surgery where there is objective evidence of a pathology, but not subjective complaints. *Id.* at 24. He did not know the Claimant's job at the time of injury, but assumed it was heavy physical labor because he was injured while lifting a heavy steel plate. *Id.* at 24. He did not recall any history of carpal tunnel syndrome, and he only reviewed the x-rays taken in his office on both examinations and that all interpretations of other films would be through reports. *Id.* at 24-25.

C. Surveillance Evidence

The Employer introduced two surveillance reports conducted by J. Thomas Fox & Associates, dated November 24, 1999 and February 14, 2000 (EX 7; EX8), and a post-hearing deposition of Steven Fox, the author of the surveillance reports, taken on December 14, 2001 (EX 12). At the deposition, Mr. Fox testified that he has been employed by J. Thomas Fox & Associates in private investigation work for about eight or nine years. EX 12 at 5. He stated that Jim Rondeau contacted him on behalf of the Employer to conduct surveillance of the Claimant, which he did perform during two periods of time in November 1999 and February 2000. *Id.* at 6. He further stated that he prepared two reports in connection with these surveillance activities, dated November 24, 1999 and February 14, 2000 (EX 7; EX 8). *Id.* at 7.

Mr. Fox testified that he followed the Claimant to a medical building, a supermarket and through nine holes of golf in November 1999 and to a Social Security office in St. Louis and the next day to another local golf course in February 2000. *Id.* at 7-8. Mr. Fox said that the reports were produced from his notes that were contemporaneously taken during the surveillance. *Id.* at 8. He also identified a videotape which is included in the deposition transcript as Deposition Exhibit 4 as a copy of the original videotape footage that took of the Claimant in November 1999 and February 2000. *Id.* at 9.

On cross-examination, Mr. Fox testified that he did not know the total length of the videotape. *Id.* at 10. In response to whether he taped continuously on these occasions, he stated that he followed the Claimant behind on a golf cart during the November 1999 investigation videotaping him. *Id.* at 10-11. He did not know the exact length of time on that date but stated that it was over an hour, though not the entire nine holes of golf. *Id.* at 11. He stated that he had quickly rented a cart and videotaped what he could. *Id.* He stated that for the February 2000 investigation, he taped off and on for various holes from different parking areas, whenever he saw the Claimant *Id.* He testified that he observed the Claimant on five days -- November 18-19, 1999, February 4, 8-9, 2000. *Id.* at 12. He then testified that the Claimant played golf at the Eagle Springs Golf Course on November 18, 1999 and the St. Ann's Golf Course on February 8,

2000. *Id.* at 12. He stated that the Claimant played with a group of golfers on both occasions. *Id.* at 13.

On redirect examination, Mr. Fox testified that on the November 18, 1999, he observed the Claimant teeing off on the first hole and walking down the fairway, at which point he curtailed his surveillance so that he could rented a golf cart, catching up with the Claimant at about the third hole. *Id.* He continued that he taped him pretty much continuously, while trying to avoid detection. *Id.* at 14. He stated that any gaps on the tape corresponded with the times he was unable to film the Claimant. *Id.* He did not believe there were carts at St. Ann's Golf Course, so he taped the Claimant from the parking lot and certain side streets. *Id.* He agreed that he did selectively tape the Claimant but said that he taped the Claimant as much as he could. *Id.* at 15.

D. Labor Market Survey Evidence

The Employer introduced labor market surveys from Brenda Young, MA, CRC, CDMS, and Fran Whipps, M.Ed., CRC. In her labor market survey, which is dated March 16, 2000, Ms. Young stated that she reviewed medical reports, including those of Drs. Robson, Wayne, and Willetts and depositions of the Claimant and Dr. Wayne. She reported that the jobs identified in the survey focused on sales positions, customer service and assembly and accounted for the restrictions indicated by Dr. Willetts (namely, that the Claimant should avoid repetitive bending, lifting more than 15 pounds, sitting more than 45 minutes, standing more than 2 hours, and work in tight compartments) as well as the Claimant's work and educational background. Based on her survey, Ms. Young identified the following openings in the labor market for the area of the Claimant's residence:

(1) Salesperson at Gateway Airgas, St. Louis, Missouri, at least four current openings in St. Louis metropolitan area, requiring knowledge of welding equipment and machinery, involves developing customer list, identifying customer needs, applicants should have sales ability and be able to identify customer needs and provide technical assistance, paying $40,000 to $50,000 per year (base salary plus commission);

(2) Counter Salesperson at Gateway Airgas, St. Louis, Missouri, future openings, involves processing telephone and walk-in orders, completing invoices, and providing customer service, paying $10-$11 per hour;

(3) Outside Salesperson at Rod's Service, Inc., St. Louis, Missouri, current opening, involves making cold calls to potential customer to sell welding equipment and supplies, paying $40,000 to $50,000 (salary plus a percentage of sales), within two years, a good salesperson would be able to increase to close to the upper range of salary;

(4) Rental Clerk at Ango Rental, St. Louis, Missouri, employer would interview potential candidates for three to four positions filled per year, welding background helpful, paying $7 to $8 per hour;

(5) Counter Sales Person at CeeKay Supply, Co., St. Louis, Missouri, future openings for persons with knowledge of welding and welding equipment with on-the-job training available, paying $8.00 to $10.00 per hour;

(6) Central Station Monitor at Central District Alarm, St. Louis, Missouri, future openings for persons to monitor security alarm systems using computer system, requires basic computer familiarity, paying $8.50 per hour to start;

(7) Dispatcher at Central County Alarm, Ellisville, Missouri, future openings anticipated within six months, involves sending emergency services to respond to 911 calls, provides on-the-job training, paying $14.50 per hour;

(8) Central Station Monitor at TCS-The Central Station, St. Louis, Missouri, future openings anticipated at least every six months, requiring good phone skills and public service experience, paying $7.00 per hour to start;

(9) Alarm Monitor at Center Point Technologies, St. Louis, Missouri, two current openings for applicants with customer service skills, good grammar, and ability to use a computer keyboard, involves sending requests to emergency service providers to answer alarm calls, paying $7.50 - $8.00 to start, $9.00 per hour with experience;

(10) Teleservice counselor at Encore Teleservices, St. Louis, Missouri, five or more current openings, involves contacting home owners regarding refinancing opportunities, paid training provided along with paid vacations and holidays, paying $9.00 to $10.00 per hour to start, teleservice counselors earn bonuses which generally after three months will bring their salary approximately $10.50 per hour or more;

(11) Telemarketing/Telephone Positions at AON Innovative Solutions, Chesterfield, Missouri, five or more current openings, requires customer service experience, involves marketing service computers, computer services and auto service contracts, on-the-job training provided, paying $7.50 per hour plus commissions, averaging $11.00 per hour within 30 days;

(12) Telemarketing/Telephone Positions at Advance Promotions, St. Ann, Missouri, four current openings, involves day or evening hours processing outbound calls for Visa credit cards, basic typing skills required, training provided, paying $7.00 per hour plus bonuses, to a range of $11.00 to $14.00 per hour;

(13) Rental Agent at Budget Car Rental, St. Louis, Missouri, six future openings anticipated in next six months as six positions filled in prior week, involves customer service representatives assigned to sales counter, good appearance

required; experience preferred, training provided, paying $8.00 per hour plus incentives, to a range of $12.00 to $15.00 per hour;

(14) Teleservice Position at Available Communications, Inc., St. Louis, Missouri, four or more current openings for full or part-time day or evening positions, involves taking telephone messages and providing answering service, minimal typing of 20 words per minute and pleasant telephone voice required, salary unavailable;

(15) Teleservice Position at Metro One Telecommunications, St. Louis, Missouri, five or more current openings, entry-level typing test and professional telephone presence required, paid training, medical and dental available, paying $9.00 per hour to start with increases to $10.41/hour in three months;

(16) Travel Counselors at AAA Auto Club, St. Louis, Missouri, full and part-time positions available and applications accepted for next round of hiring expected within approximately one month, approximately 20 new hires in last 90 days, involves taking emergency road service requests, training provided, passage of videotaped customer service test and minimal typing of 25 words per minute required, paving $9.44 to start;

(17) Cashier at Airpark, St. Louis, Missouri, future openings possible in next 30 days, two hires made in the last week; involves sitting or standing in a service booth to receive parking payments from customers and providing appropriate change; paying $6.80 per hour to start, plus .25 after 90 days;

(18) Cashier at Park N Fly, St. Louis, Missouri, eight or more positions available, involves working in a toll booth in the parking facility, good customer service skills required, training provided, paying $7.00 per hour;

(19) Assembler/Machine Operator at Essex Manufacturing, St. Louis, Missouri, three current openings for medical parts assembler, involves sedentary bench work, requiring basic hand tool use and ability to learn assembly process, paying $6.00 plus per hour; and,

(20) Assembler/Machine Operator at Control Devices, Inc., St. Louis, Missouri, openings expected monthly; involves sedentary bench work for company manufacturing small valves, paying $5.75 per hour.

At her deposition on May 16, 2003, Ms. Young testified that she had contacted all of the employers listed in her labor market survey and that all 20 of these positions were available at the time that the survey was conducted in March 2000. EX 13 at 16. On cross-examination by the Claimant's attorney, Ms. Young testified that she had not taken into consideration any limitations that the Claimant may have as a result of his carpal tunnel syndrome. *Id*. at 19. She was questioned about the salary for the Gateway Airgas sales jobs listed in her survey, and she stated that the $40,000.00 salary for these positions consists of a base salary plus commissions that an

employee would receive after completing an orientation period. *Id*. at 19-20. Although the positions require sales ability, Ms. Young testified that they did not "necessarily" require sales experience and that she assumed that the Claimant's experience as a welding instructor would provide him with the necessary knowledge of the welding industry for these sales jobs. *Id*. at 21. She also testified that she did not think that the Claimant's age would hinder his chances of being hired for a sales position, noting that age discrimination is illegal and that several of the employers contacted in her survey indicated interest in the Claimant's background. *Id*. at 21-22. Regarding the sales position at Rod's service, Ms. Young stated that there was one vacancy at the time of her survey, but she did not know the starting base salary for the position. *Id*. at 22-23. She further testified that there were no current openings at the time of her survey with Ango Rental, and she said that she did not know whether the Claimant possessed the basic computer skills required for the central station alarm monitoring job, though she assumed that he did in light of his recent college degree. *Id*. at 24-25. She also testified that there were no monitor positions available at the time of her survey. *Id*. at 26. Ms. Young said that she was not sure what field the Claimant had received his degree in and that it was her understanding that he had worked as a guidance counselor. *Id*. at 24-25. Lastly, she testified that all of the telemarketing positions cited in her survey require an ability to type at a rate of 20 words per minute and that she did not know, beyond what she inferred from the fact that he earned a college degree, whether the Claimant had this ability. *Id*. at 26-27.

In her labor market survey which was conducted on March 21, 2000, Ms. Whipps reviewed the 1992 and 1995 depositions of the Claimant, a 1995 deposition of Dr. Robson, a 1995 deposition of Dr. Wayne, the 1995 and 1999 medical reports of Dr. Robson, a 1991 report of Dr. Willetts, and a 1993 report of Dr. Wayne. CX 6. She stated that she was instructed to perform her research with assumptions that the Claimant had no work restrictions, although many of the jobs identified were light duty, and that he had earned a degree in human resources or other similar program, and had work experience up to and including his job with Webster University which may have been as a guidance counselor. *Id.* Based on her survey, Ms. Whipps identified the following job opportunities in the Human Resource Manager and Related Fields:

(1) United Electric Supply, St. Louis, Missouri, prefer recent college graduate or human resources experience, salary dependent on experience;

(2) Michigan National/Executive Relocation, Farmington Hills, Missouri, seeking part-time human resource representative for St. Louis area, prefer B.A. in Business, plus experience in recruitment, salary unavailable;

(3) The Dial Corporation, St. Louis, Missouri, requires B.A. in Human Resources, prefers manufacturing or distribution experience and training experience, salary unavailable;

(4) McDonald's Corporation, Chesterfield, Missouri, opening for human resources specialist, B.A. in related area, salary unavailable;

(5) Burns International Security, St. Louis, Missouri, hiring recruiter with excellent communication skills, salary unavailable;

(6) Sanford Brown College, St. Louis, Missouri, seeking entry-level admissions representative, salary unavailable;

(7) Keller Graduate School of Management, St. Louis, Missouri, B.A. required, involves student recruitment and advice to continuing education students, salary unavailable;

(8) Ranken Technical College, St. Louis, Missouri, hiring admissions representative, including high school recruitment, salary unavailable.

Ms. Whipps also identified seven positions in the manufacturing/welding sector, involving turning, welding, grinding, milling, and MIG welding duties with only two listings of available hourly rate, and she identified the following positions in training and social services:

(1) Kelly Services, St. Louis, Missouri, seeking people-oriented person to instruct and implement duties on packing line, salary unavailable;

(2) MERS Personnel, St. Louis, Missouri, seeking job placement specialist for job development and placement, salary unavailable;

(3) Community Living, Inc., St. Charles, Missouri, full and part-time openings for residential coordinators, involves plan development, implementing and reporting, supervision of direct support staff, salary unavailable.

In an addendum to her survey, Ms. Whipps provided print-outs of possible positions identified through an internet search. The majority of these positions are for human resources professionals with experience, and some of the listings give little or no information about the employer, salary, and experience required. CX 6, Addendum II.

Ms. Whipps testified at her deposition on May 16, 2003 that she had reached a conclusion from the information she reviewed on the Claimant that work in human resources management and related fields, manufacturing and welding, training and social service were all appropriate. EX 14 at 7. She stated that she had contacted the employers for the jobs listed in Addendum I to her survey and that at least some of the employers were hiring in March 2000 when the survey was done. *Id*. at 9-10. Ms. Whipps explained that the salaries for many of the positions listed in her survey are blank because the employers were reluctant to provide salary information. *Id*. at 10. She said that it was her opinion that the Claimant is qualified to perform the jobs listed in her survey. *Id*. at 10. Ms. Whipps further testified that she had not contacted the employers of the positions listed in the internet search section of her survey, but she had taken the Claimant's education, work history and medical condition into consideration in identifying these positions. *Id*. at 11-12. On cross-examination by the Claimant's attorney, Ms. Whipps was unable to respond to questions about the bases of her assumptions regarding the Claimant's educational and

physical suitability for the positions because she no longer had her working papers as it is her company's policy not to keep such material for too long. The following exchange is typical:

> Q. I notice in Addendum 2 that one of the jobs – there are jobs, for instance, for teachers and principals. Now, one of them in particular requires a Missouri teaching certificate. Now, do you know whether or not Mr. Smith had a Missouri teaching certificate?
>
> A. I don't know. And I'm not sure where you saw that. Let me look through this. Coordinator, coordinator, manager. I am looking. I don't find –
>
> Q. You don't have to look for anything. You don't know if he had a teaching certificate; is that correct?
>
> A. No, and like I said, I don't have my working papers so I'm not sure if there was anything in the file. I know he had done some training and he had done some kind of work with some skill I think. I'm not sure.
>
> Q. I see another job in Addendum – I think it is 3 – that talks about a manufacturing trainee which requires prior experience in work flow management. Are you aware that Mr. Smith had any – do you know if he had any experience in work flow management?
>
> A. I don't know. I'm at a hindrance. I don't have my working papers. I apologize, but we just typically – it's our policy not to keep those for too long.

Id. at 19-20.

IV. Findings of Fact and Conclusions of Law

A. Nature and Extent of the Claimant's Disability

The parties have, as discussed above, stipulated that the Claimant sustained a back injury on July 23, 1991 which arose out of his employment with the Employer. The sole issue presented is the extent to which the Claimant is under a continuing disability and the nature of that disability. The Claimant seeks an award of permanent partial disability compensation beginning on August 1, 1995 based on a wage-earning capacity deflated to the 1991 level of $200.00 a week. Claimant's Brief at 20-21. He notes that the parties had previously reached an agreement on his wage-earning capacity in 1995, which was derived by multiplying 40 hours per week by $5.00 per hour, and the Employer has been paying partial disability compensation at the rate of $366.67 per week, based on two-thirds of the difference between the Claimant's average weekly wage and the agreed-upon wage-earning capacity of $200.00 per week. *Id.* at 17. The Claimant asserts that the $200.00 per week wage-earning capacity is still reasonable in light of his current earnings, which average $128.00 when adjusted to 1991 levels, inasmuch as his condition has not really

changed since 1995 when the parties reached agreement on his wage-earning capacity. *Id.* at 20. While the Employer agrees that the parties had previously stipulated to a wage-earning capacity, adjusted to a 1991 value, of $200.00 per week effective August 1, 1995, it now argues that the Claimant has a significantly greater wage earning capacity based on the fact that examining doctors have found only minor work restrictions, which is confirmed by the Claimant's active lifestyle as shown on the surveillance video, the fact that he obtained a bachelor's degree subsequent to the 1991 injury and that fact that he has returned to work on a part-time schedule and has expressed interest in working full-time. Employer's Trial Memorandum at 9-10.

In a claim for disability compensation that is not based on the schedule of losses in section 8(c) of the Act, a claimant has the initial burden of establishing that he cannot return to his usual employment. *Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45, 48 (1997); *Elliott v. C & P Telephone Co.*, 16 BRBS 89, 91 (1984). A claimant's usual employment is defined as the regular duties the claimant was performing at the time of injury. *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689, 693 (1982). To determine whether a claimant has carried his or her *prima facie* burden of establishing an inability to return to usual employment, the administrative law judge must compare the medical opinions regarding the claimant's physical limitations with the requirements of the claimant's usual work at the time of the injury. *Curit v. Bath Iron Works Corp.*, 22 BRBS 100, 103 (1988).

At the hearing, the Claimant testified that at the time of the 1991 injury, he was employed as a training instructor whose job duties included setting up demonstration equipment for hands-on training and lifting steel plates which weighed between 110 and 120 pounds. In addition, he testified that he was injured while cutting and lifting steel to fabricate plates for demonstration equipment that would be used to qualify welders. Based on this uncontradicted evidence, I find that the Claimant's usual employment as a training instructor required him to, at least occasionally, lift metal plates weighing over 100 pounds.

The most recent work restrictions assigned to the Claimant by his treating physicians were developed in 1995 when Dr. Taylor restricted him from: sitting or standing more than two hours at a time; walking more than one-quarter mile; lifting over 20 pounds; pushing or pulling over 25 pounds; performing any bending, squatting/stooping, crawling, climbing, kneeling, twisting or reaching above shoulder level; operating a motor vehicle, crane or forklift; working in tight or confined areas; or stressful physical activity. Dr. Robson, who examined the Claimant for the Employer in 1995 and 1999, testified at his most recent deposition on December 13, 2001 that the Claimant had an 8% permanent partial impairment of the whole man based on the cervical and lumbar strain and should be limited to performing light to medium duty work, which is defined as occasional 50-pound lifting, repetitive 30-pound lifting, and no repetitive bending, stooping, twisting or working in awkward positions.[5] Dr. Wayne, who also examined the Claimant for the

[5] At an earlier deposition conducted right after the 1995 examination, Dr. Robson did not assign the Claimant any work restrictions and testified on cross-examination that he was aware that the Claimant's pre-injury employment required heavy lifting. EX 10, Deposition Exhibit 3 at 9, 13. Dr. Robson offered no explanation for the change in his opinion from the 1995 to the 2001 depositions, and neither counsel attempted to elicit any explanation.

Employer in 1993 and 2001, testified at his deposition on December 14, 2001 that he would place no work restrictions on the Claimant, while acknowledging that the Claimant had previously performed heavy physical labor.

After considering these somewhat contradictory medical opinions in light of the entire record, I have given greatest weight to the latest opinion from Dr. Robson as I find that it more consistent with the overall medical record, including the fact that Claimant has continued to seek periodic treatment for exacerbations of his back condition and the fact that the limitations described by Dr. Robson are similar to those assigned by Dr. Taylor in 1995, and because Dr. Wayne's review of the medical record appears to have been less thorough than the review undertaken by Dr. Robson. In this regard, it is noted that (1) Dr. Wayne expressly stated in his report that he reviewed a "portion of the patient's medical records"and that the only records mentioned in his report and deposition testimony are those from Dr. Robson, (2) Dr. Wayne only reviewed the x-rays taken in his office while Dr. Robson personally reviewed and interpreted all of the available x-ray and MRI films and (3) Dr. Wayne emphasized that his opinion was based on the absence of any objective evidence of pathology, an assumption that is called into question by the 1995 electromyogram nerve conduction study revealing a "mild polyneuropathy of the lower extremities" (CX 17) and by the opinion from Dr. Ibrahym who recently treated the Claimant for his back symptoms and reported after multiple tests and examinations that he believed that the Claimant's ongoing low back symptoms may be secondary to neurogetic claudication or radiculopathy. CX 20. As a treating physician, Dr. Ibrahym's opinion carries some additional weight. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 1043-44 (2d Cir. 1997) (ruling opinion of psychiatrist who treated claimant for two-year period entitled to "great weight" as the treating physician). *See also Amos v. Director, OWCP*, 153 F. 3d 1051, 1054 (9th Cir. 1998), *amended* 164 F.3d 480 (1999), *cert. denied sub nom Sea-Land Service, Inc. v. Director, OWCP*, 528 U.S. 809 (1999); *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 371 (6th Cir. 1998); *Rivera v. Harris*, 623 F.2d 212, 216 (2d Cir. 1980). Finally, I note that Dr. Taylor, another treating physician, also placed exertional restrictions on the Claimant which would preclude him from performing the lifting requirements of his usual work for the Employer.

Based on this assessment of the medical evidence, I credit Dr. Robson's most recent medical opinion regarding the Claimant's physical capacities and limitations. Since the Claimant's restriction against lifting more than 50 pounds would clearly preclude him from performing the heavy lifting required in the position of training instructor, I conclude that he has met his burden of establishing that he would be unable to perform his usual work. In arriving at this conclusion, careful consideration was given to the surveillance evidence offered by the Employer. Although the videotape show the Claimant playing golf and engaging in activities such as swinging clubs, bending to pick up balls and pulling his golf bag on a cart with no apparent signs of significant pain or limitation, I find that this evidence does not, in the absence of an opinion from a physician that the physical activities displayed on the videotape are indicative of an ability to engage in heavy lifting, establish that the Claimant could return to his usual employment. It is important to bear in mind that the Claimant was employed as a welding training instructor, not as a recreational golfer. Significantly, the videotape does not show the Claimant engaging in physical activities which he has denied being able to perform or which are comparable to the exertional demands of his pre-injury employment. *Cf. Phillips v. California Stevedore & Ballast Co.*, 9 BRBS 13, 16

(1978) (injured worker who claimed inability to climb stairs and ladders shown mounting and dismounting a horse). In my view, the surveillance evidence at most suggests that the Claimant may exaggerate his low back symptoms, and it appears consistent with the opinion of Dr. Robson that he can perform light or medium work.

Since the Claimant has established that he is unable to return to his former employment because of work-related injuries, the burden shifts to the Employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which the Claimant is capable of performing and which he could secure if he diligently tried. *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (2d Cir. 1991) (*Palombo*); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981) (*Gulfwide Stevedores*); *Preziosi v. Controlled Industries*, 22 BRBS 468, 471 (1989). If the Employer does not carry this burden, the Claimant is entitled to a finding of total disability. *American Stevedores v. Salzano*, 538 F.2d 933, 935-36 (2d Cir. 1976). To satisfy its evidentiary burden, "the employer does not have to find an actual job offer for the claimant, but must merely establish the existence of jobs open in the claimant's community that he could compete for and realistically and likely secure." *Palombo*, at 74, citing *Gulfwide Stevedores* at 1042-43. For job opportunities to be realistic, the employer must establish their precise nature, terms, and availability. *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94, 97 (1988). Once an employer satisfies its burden, a claimant may rebut the showing of suitable alternative employment by establishing "that he was reasonably diligent in attempting to secure a job 'within the compass of employment opportunities shown by the employer to be reasonably attainable and available.'" *Palombo*, at 74, quoting *Gulfwide Stevedores* at 1043.

The Employer offers two labor market surveys, identifying jobs in the St. Louis area to which the Claimant relocated in 1992. *See Wood v. U.S. Department of Labor*, 112 F.3d 592, 597 (1st Cir. 1997) (when an employee has moved from the place where the injury was sustained, the "employee's chosen community is presumptively the proper choice for determining earning capacity."). At the outset, I give no weight to the labor market survey prepared by Ms. Whipps as I find that her inability to respond at her deposition to questions from the Claimant's attorney is tantamount to a denial of the Claimant's right to cross-examination. *See Southern Stevedoring Co., Inc. v. Voris*, 190 F.2d 275, 277 (5th Cir. 1951) (relaxed standards for admission of evidence under the Longshore Act "does not, indeed it could not, dispense with a right so fundamental in Anglo-Saxon law as the right of cross examination."). Moreover, even assuming that the Whipps survey could be considered, I find it insufficient to carry the Employer's burden of establishing the availability of suitable alternative employment. As discussed above, Ms. Whipps identified positions in the human resource and related fields, the manufacturing/welding sector and the training and social services fields. Except for positions in the manufacturing/welding sector, Ms. Whipps did not provide any salary information, which is an essential term of the jobs and a requirement for establishing suitable alternative employment. Regarding the manufacturing/welding sector jobs, the record contains uncontradicted evidence that the Claimant has a hand impairment for which, the Employer's attorney acknowledged at the hearing, he is currently receiving benefits. TR. 11. The Claimant testified that he could not perform any kind of non-mechanized welding or machinery work because of his hand problems, and Dr. Browning gave the Claimant a 35% bilateral hand impairment rating. Accordingly, I find that the Claimant cannot perform any non-mechanized manufacturing/welding sector jobs, including those identified

by Ms. Whipps in her labor market survey, particularly where she did not account for the Claimant's hand condition in conducting her survey of jobs. Finally, Ms. Whipps included job advertisements from the internet in her survey. These advertisements do not contain all of the essential terms of the positions and are similar to classified advertisements, which cannot be used to show suitable alternative employment. *See Manigault v. Stevens Shipping Co.*, 22 BRBS 332, 334 (1989).

The other labor market survey introduced by the Employer from Ms. Young identifies 20 employers in the Claimant's geographic area who had current and future job openings as a salesperson, rental clerk, dispatcher/alarm system monitor, telemarketer/teleservice counselor, cashier, and assembler/machine operator. I find that the jobs with future or anticipated openings cannot be used to show suitable alternative employment because their availability is too speculative. It is simply not possible to predict with any kind of reliability the impact that any possible shifts in the economy may have on the financial viability of these employers and their need for future employees. Regarding the outside salesperson positions at Gateway Airgas and Rod's Service, Inc., I find these jobs cannot constitute suitable alternative employment because the information provided in the survey lacks sufficient specificity to determine what the base salary would be without any bonuses. As discussed previously, I find that assembler/machine operator positions are not within the Claimant's physical restrictions, and I similarly find that the Claimant cannot perform the positions that require minimal typing skills of 20-25 words per minute and/or the passage of an entry-level typing test, including the telemarketing and alarm monitor/dispatcher positions, due to the limitations on the use of his hands caused by carpal tunnel syndrome. While the Claimant did testify that he used a computer on the job at Webster University, there is no evidence that he possesses typing skills, and Ms. Young conceded at her deposition that she did not take the Claimant's hand limitations into consideration. EX 13 at 19.

However, I find that Ms. Young's survey does establish that jobs have been available since March 2000 within the Claimant's geographic area and physical capabilities as a teleservice counselor at Encore Teleservices and a cashier at Park N Fly. Ms. Young stated in her report that these positions conform to the work limitations formulated by Dr. Willetts in 1991 (namely, that the Claimant should avoid repetitive bending, lifting over 15 pounds, sitting more than 45 minutes, and standing more than 2 hours), which are significantly more restrictive than those assigned by Dr. Taylor in 1995 and those identified by Dr. Robson whose opinion I have credited on the Claimant's work capacity. Although Ms. Young did not specifically state that the Claimant could perform the Park N Fly position by alternating between sitting and standing, she did report that a similar position at Airpark would enable the Claimant both sit and stand, and I find that it is reasonable to infer that the position at Park N Fly would similarly allow the Claimant to alternate between sitting and standing.[6] Neither of these positions requires typing skills or use of a computer keyboard for any regular periods of time. To the extent that there may be a requirement for limited keyboard use to enter data for the teleservice counselor position at Encore Teleservices, I note that the Claimant testified that he could use a keyboard on a limited basis and that he did use a keyboard for about an hour per day at his Webster University job in order to

[6] No cashier jobs at Airpark were available at the time the survey was conducted in March 2000. EX 5 at 8.

train students on the computer. TR 49-53. I also note that the Claimant acknowledges in his supplemental brief that the Employer has identified some jobs for which he is qualified, and his attorney did not call the suitability of the Encore and Park N Fly jobs into question during her cross-examination of Ms. Young at the post-hearing deposition.

As the Employer has established the existence of suitable jobs, the burden returns to the Claimant to show that he has exercised reasonable diligence in attempting to secure employment, but was unsuccessful. On his efforts to secure employment, the Claimant testified that he reviewed the labor market surveys and determined that about 25 percent of the listed jobs were appropriate for him. He said that he applied for jobs that he felt he could perform given his education, skills, and physical restrictions, and he eventually obtained part-time employment as a floor manager and trainer at Colquitt Unlimited, a construction company. While he identified several employers to whom he applied for work, there is no evidence that he ever applied for the jobs at either Encore or Park N Fly that the Employer has shown to be suitable and available. On this record, I find that the Claimant has failed to meet his rebuttal burden of demonstrating that he applied for the suitable and available jobs identified by the vocational evidence but was not hired.

Accordingly, I conclude that the Employer has successfully established that in addition to the part-time employment that the Claimant has obtained, full-time suitable alternative employment paying starting wages between $7.00 and $9.00 per hour has been in existence in his geographic area since March 16, 2000, the date of Ms. Young's labor market survey. *See Palombo*, 937 F.2d at 70. Since the wages paid by the suitable alternative jobs are substantially less than the Claimant's pre-injury average weekly wage, I find that he continues to suffer a loss of wage-earning capacity and, therefore, remains partially disabled.

As concerns the nature of the Claimant's continuing disability, the medical evidence shows that Dr. Sprafke, the Claimant's treating physician at that time, gave him a permanent partial impairment rating in 1992. The evidence also shows that the Claimant's symptoms and treatment have been essentially unchanged since 1992, and the Claimant seeks an award of permanent partial disability benefits since August 1, 1995. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement which is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). Based on the medical evidence of record, I find that the Claimant reached a point of maximum medical improvement from his work-related back injury by August 1, 1995. Accordingly, I conclude that his continuing partial disability has been permanent in nature since August 1, 1995.

B. Compensation Due and Employer Credits

Pursuant to section 8 of the Act, the amount of the Claimant's disability compensation is calculated from his average weekly wage ("AWW") which the parties have stipulated to be

$750.00. 33 U.S.C. § 908. The Claimant's entitlement to permanent partial disability beginning on August 1, 1995 is controlled by section 8(c)(21) which provides that in cases of permanent partial disability not covered by the schedule of losses "compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability." 33 U.S.C. § 908(c)(21). The Claimant has been receiving temporary partial disability compensation since 1995 at a rate equal to 66 2/3 of the difference between his AWW and a stipulated earning capacity of $200.00 per week, and the parties have presented no evidence or argument prior to Ms. Young's March 16, 2000 labor market survey that the Claimant's post-injury wager-earning capacity was anything other than $200.00 per week. Therefore, I find that the Claimant is entitled to an award of permanent partial disability compensation from August 1, 1995 through March 15, 2000 at the 66 2/3 compensation rate of $366.67 per week.

Beginning on March 16, 2000, the Claimant's compensation rate must be reassessed in light of the Employer's showing of suitable alternative employment. The positions at Encore Teleservices, Inc. pay $9.00 to $10.00 per hour to start and the jobs at Park N Fly pay $7.00 per hour. Using an average hourly rate of $8.00 for the suitable alternative employment; *see Avondale Industries v. Pulliam*, 137 F.3d 326, 328 (5th Cir. 1998); I find that the $320.00 per week ($8.00 x 40 hours) that the Claimant could have earned in full time suitable alternative employment more fairly and reasonably represents his actual wage-earning capacity than the lower earnings that he has received from his part-time employment at Colquitt Unlimited since September 2001. To ensure that the Claimant's wage-earning capacity is not distorted by inflationary factors, the wages shown to be presently available from suitable alternative employment must be converted to their equivalent at the time of injury. *LaFaille v. Benefits Review Board*, 884 F.2d 54, 61 (2nd Cir. 1989); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297, 298 (1984). Since the record does not show what the Encore and Park N Ride positions paid in 1991, it is appropriate to use the annual percentage increases made to the National Average Weekly Wage ("NAWW") to adjust the $8.00 per hour wage downward. *Quan v. Marine Power & Equipment Company*, 30 BRBS 124, 127-28 (1996); *Richardson v. General Dynamics Corp.*, 23 BRBS 327, 330-31 (1990). The NAWW has increased 22.32% between January 1991 and

March 2000.[7] Therefore, the March 2000 wage-earning capacity of $320.00 per week is multiplied by a factor of .7768 to arrive at a January 1991 wage-earning capacity of $248.58 which I find to fairly and reasonably represents the Claimant's post-injury wage-earning capacity. Based on this calculation, I find that the Claimant has suffered a loss of wage-earning capacity in the amount of $501.42 per week (the difference between his average weekly wage and his wage-earning capacity) since March 16, 2001 and, pursuant to section 8(c)(21), he is entitled to permanent partial disability compensation at the rate of 66 2/3% of that difference, or $334.30 per week from March 16, 2001 to the present and continuing.

Since the parties have also stipulated that the Employer has voluntarily paid the Claimant temporary total and temporary partial disability compensation, I find that the Employer is entitled to a credit in the amount of these prior compensation payments pursuant to section 14(j) of the Act. *Balzer v. General Dynamics Corp.*, 22 BRBS 447, 451 (1989), *aff'd on reconsideration*, 23 BRBS 241 (1990); *Scott v. Transworld Airlines*, 5 BRBS 141, 145 (1976).

C. Attorney's Fees

Since the Claimant has successfully established his right to permanent disability and in part successfully defended the Employer's claimant that he regained a wage-earning capacity equal to or even exceeding his pre-injury AWW, I find that he is entitled to an award of attorneys' fees under section 28(a) of the Act. *See Canty v. S.E.L. Maduro*, 26 BRBS 147, 157 (1992). *See also American Stevedores v. Salzano*, 538 F.2d 933, 937 (2nd Cir. 1976); *Ingalls Shipbuilding v Director, OWCP*, 920 F.2d 163, 166 (5th Cir. 1993).[8] The Claimant's attorney has filed an itemized application for attorney's fees and costs in the amounts of $15,810.98, and no objections have been raised on the requested fees and costs. Upon review, I find that the fee application complies with the requirements of 20 C.F.R. § 702.132(a) and that the fees and costs requested are reasonably commensurate with the necessary work done, taking into account the quality of representation, the complexity of the legal issues involved and the amount of benefits awarded.

V. Order

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the following order is entered:

1. The Employer, Electric Boat Corporation, shall pay to the Claimant, Clarence Smith, permanent partial disability compensation pursuant to 33 U.S.C. § 908(c)(21) at the rate of

---

[7] Employment Standards Administration, Office of Workers' Compensation Programs Division of Longshore and Harbor Workers' Compensation, Chart of National Average Weekly Wages (NAWW), available at http://www.dol.gov/esa/owcp/dlhwc/NAWWinfo.htm.

[8] It is additionally noted that in establishing his entitlement to permanent disability compensation, the Claimant is no longer subject to the five-year statutory cap on temporary partial disability compensation payments. *See* 33 U.S.C. § 908(e).

$366.67 per week from August 1, 1995 through March 15, 2000, and at the rate of $334.30 per week from March 16, 2000 to the present and continuing until further order;

2. The Employer shall be allowed a credit pursuant to 33 U.S.C. § 914(j) for prior payments of temporary total and temporary partial disability compensation since August 1, 1995;

3. The Employer shall pay to the Claimant's attorney, Carolyn P. Kelly, Esq., attorney's fees and costs in the amounts of $15,810.98; and

4. All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts
DFS:jal